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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 1 and 25

[IB Docket No. 11-133; FCC 12-93]

Review of Foreign Ownership Policies for Common Carrier and Aeronautical Radio Licensees

AGENCY: Federal Communications Commission.

ACTION: Final rule.

SUMMARY: In this document, the Commission adopts a new approach to its review of foreign ownership in common carrier radio station licensees, where the foreign ownership is held in the licensee through U.S.-organized entities that do not control the licensee.

This action responds to pleadings filed in response to the Notice of Proposed Rulemaking initiating this docket and to the Public Notice in this docket seeking further comment on the new approach.

DATES: Effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Kathleen Collins or Susan

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SUPPLEMENTARY INFORMATION: This is a summary of the Commission's First Report and Order in IB Docket No. 11-133, FCC 12-93, adopted August 17, 2012, and released August 17, 2012. The full text of this document is available for inspection and copying during normal business hours in the FCC Reference Information Center, Portals

II, 445 12th Street, SW, Washington, D.C. 20554. The complete text may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street SW, Room CY-B402, Washington, D.C. 20554, telephone: (800) 378-3160, fax: (202) 488-5563, or via its web site, <http://www.bcpweb.com>. The complete text also is available on the Commission's web site at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-12-93A1.pdf. To request the document in accessible formats for people with disabilities (Braille, large print, electronic files, audio format), send an email to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

Summary of First Report and Order

1. On April 11, 2012, the International Bureau, on behalf of the Commission, issued a Public Notice in this docket (77 FR 24452, April 24, 2012) inviting comment on the legal and policy implications of forbearing under section 10 of the Communications Act of 1934, as amended (the Act), 47 U.S.C. 160, from applying section 310(b)(3) of the Act to certain foreign ownership interests in common carrier licensees, where those interests are held through U.S.-organized entities that do not control the licensee. The First Report and Order forbears, pursuant to section 10(a) of the Act, from applying the 20 percent foreign ownership limit set forth in section 310(b)(3) of the Act to the class of common carrier licensees in which foreign ownership in the licensee is held through U.S.-organized entities that do not control the licensee, to the extent the Commission determines such foreign ownership is consistent with the public interest under the policies and procedures the Commission has adopted for the public interest review of foreign ownership subject to section 310(b)(4) of the Act. The First Report and Order refers to

this class of licensees as “licensees subject to section 310(b)(3) forbearance.” The forbearance approach applies only to such foreign ownership in common carrier licensees and not to broadcast or other licensees covered by section 310(b)(3). Nor does the approach apply to foreign ownership held in a licensee other than indirectly through an intervening U.S.-organized entity that does not control the licensee.

2. Section 10(a) of the Act enables the Commission to forbear from applying any regulation or any provision of the Act to a telecommunications carrier or service, or a class of telecommunications carriers or services, if the Commission determines that forbearance satisfies the following three-pronged test: (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and (3) forbearance from applying such provision or regulation is consistent with the public interest. 47 U.S.C. 160(a).

3. The First Report and Order finds that forbearing from applying section 310(b)(3)’s 20 percent foreign equity and voting limits to the class of common carrier licensees in which foreign interests in the licensee are held through U.S.-organized entities that do not control the licensee, to the extent such foreign ownership serves the public interest as determined under the policies and procedures the Commission uses for assessing foreign ownership of the controlling U.S.-organized parents of common carrier licensees under section 310(b)(4), satisfies each of the three section 10 criteria. The First Report and Order requires licensees subject to section 310(b)(3) forbearance to file a

petition for declaratory ruling or similar request to obtain Commission approval before foreign ownership held in the licensee through U.S.-organized entities that do not control the licensee, together with foreign ownership held in the licensee itself, exceeds 20 percent of the licensee's equity interests and/or 20 percent of its voting interests.

4. In the First Report and Order, the Commission concludes that, under the first prong of section 10, it is not necessary to apply the foreign ownership limits in section 310(b)(3) to licensees subject to section 310(b)(3) forbearance to ensure that their charges and practices are just and reasonable and not unjustly or unreasonably discriminatory. Based on the Commission's experience in applying its policies under section 310(b)(4), the Commission finds no evidence that the foreign ownership of a common carrier licensee, in and of itself, is directly relevant to the carrier's compliance with the requirements of sections 201 and 202 of the Act that charges, practices, classifications, and regulations be just and reasonable and not unjustly or unreasonably discriminatory. In addition, the Commission has other, more tailored tools at its disposal, such as section 201, 202, and 208 of the Act, to ensure that rates, practices and classifications of common carrier licensees are just and reasonable and not unjustly or unreasonably discriminatory.

5. The Commission also concludes that, under the section prong of section 10, it is unnecessary for the protection of consumers to apply section 310(b)(3)'s 20 percent limit to foreign interests in licensees subject to section 310(b)(3) forbearance. Under the forbearance approach, the Commission will give notice and seek public comment on a petition for declaratory ruling or similar request asking for approval of proposed foreign equity and/or voting interests in a common carrier licensee over 20 percent. This notice and comment process will inform any Commission decision to grant a petition for

declaratory ruling to exceed section 310(b)(3)'s 20 percent limit and allow the Commission to assess any potential harm to consumers.

6. The Commission concludes, under the third prong of section 10, that the public interest would be served by not applying the foreign ownership limit of section 310(b)(3) to licensees subject to section 310(b)(3) forbearance – where the licensee has greater than 20 percent foreign ownership held through U.S.-organized entities that do not control the licensee – for the same reasons that the public interest is served when the Commission allows, under section 310(b)(4), greater than 25 percent foreign ownership in the controlling U.S.-organized parent of a common carrier licensee under otherwise identical circumstances. In the context of common carrier licensees, the Commission discerns no public interest distinction between the two situations.

7. By incorporating the Commission's section 310(b)(4) policies and procedures, the forbearance approach will protect the national security objectives underlying the Act. These policies and procedures provide Executive Branch expert agencies the opportunity to review proposed foreign ownership in the controlling U.S.-organized parents of common carrier licensees for any national security, law enforcement, or public safety issues. The forbearance approach will provide the Executive Branch agencies the same opportunity to assess proposed foreign ownership in licensees subject to section 310(b)(3) forbearance.

8. In addition, the forbearance approach will ensure that foreign ownership from World Trade Organization (WTO) Member countries will be reviewed under the Commission's open entry standard, whether the foreign investment is held through U.S.-organized entities that control the licensee or through U.S.-organized entities that do not

control the licensee. The forbearance approach also comports with commenters' request in this docket that the Commission treat all "indirect" foreign ownership in a common carrier licensee in a manner consistent with the Commission's section 310(b)(4) policies and procedures so as to further the objectives of the WTO Basic Telecom Agreement. Conforming the Commission's foreign ownership policies for sections 310(b)(3) and 310(b)(4) will clarify and simplify Commission regulation of foreign ownership of common carrier licensees. The forbearance approach also will enhance competitive market conditions for common carrier licensees by allowing them and their potential owners to structure foreign investment in the licensee in a manner that best accommodates their financial considerations and business needs.

9. The forbearance approach requires a licensee to file a petition for declaratory ruling or similar request seeking Commission approval before foreign ownership held in the licensee through U.S.-organized entities that do not control the licensee, together with foreign ownership held in the licensee itself, exceeds 20 percent of the licensee's equity interests and/or 20 percent of its voting interests. The Commission, or the International Bureau on delegated authority, will place the request on notice for public comment and forward the petition to the Executive Branch agencies for review. Following conclusion of this process, the Commission, or the International Bureau on delegated authority, will issue a declaratory ruling as to whether the proposed foreign ownership is in the public interest. The licensee shall not be allowed to have foreign ownership under section 310(b)(3) in excess of 20 percent unless and until the Commission or the International Bureau has granted the licensee's request.

10. The Commission finds that the benefits of adopting the forbearance approach outweigh the costs. By forbearing from applying the section 310(b)(3) foreign ownership limit to the subject class of common carrier licensees, licensees and their potential owners will have flexibility in the structuring of their investment, free of a statutory constraint. The Commission anticipates that the costs of the approval process for proposed foreign ownership of licensees subject to section 310(b)(3) forbearance will be far less for licensees than the costs they have to incur in structuring their investments to comply with the section 310(b)(3) limit. Moreover, under the forbearance approach, the approval process will be consistent with the Commission's policy framework for foreign ownership of the controlling U.S. parents of licensees under section 310(b)(4). For these reasons, the Commission expects this approach to reduce unnecessary costs and burdens on common carrier licensees. Finally, the forbearance approach will not compromise the Commission's ability to carry out its statutory duties under section 310(b) of the Act, including protection of national security and law enforcement interests.

11. The First Report and Order defers consideration, to a later stage of the proceeding, of the comments urging the Commission to simplify the section 310(b)(4) requirements and apply those revised requirements to the evaluation of foreign interests in a common carrier licensee held through U.S.-organized entities that do not control the licensee.

Regulatory Flexibility Certification

12. The Regulatory Flexibility Act of 1980, as amended (RFA),¹ requires that a regulatory flexibility analysis be prepared for notice-and-comment rule making

¹ See 5 U.S.C. 603. The RFA, see 5 U.S.C. 601-612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, Title II, 110 Stat. 857 (1996).

proceedings, unless the agency certifies that “the rule will not, if promulgated, have a significant economic impact on a substantial number of small entities.”² The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.”³ In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act.⁴ A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (SBA).

13. The approach adopted in the First Report and Order will remove a statutory constraint on common carrier licensees, by forbearing from applying the 20 percent ownership limit under section 310(b)(3) to the class of common carrier licensees in which the foreign ownership is held in the licensee through intervening U.S.-organized entities that do not control the licensee. Instead of prohibiting foreign ownership in excess of 20 percent under section 310(b)(3), the Commission will assess whether the proposed foreign ownership in excess of 20 percent is in the public interest through an approval process that is consistent with its policies and procedures for approval of foreign ownership in a U.S.-organized entity that controls a licensee, under section 310(b)(4). The Commission believes that the new approach will reduce costs and burdens currently imposed on common carrier licensees, including those licensees that are small entities,

² 5 U.S.C. 605(b).

³ 5 U.S.C. 601(6).

⁴ 5 U.S.C. 601(3) (incorporating by reference the definition of “small business concern” in the Small Business Act, 15 U.S.C. 632). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies “unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definitions(s) in the Federal Register.”

while continuing to ensure that the Commission has the information it needs to carry out its statutory duties. Therefore, the Commission certifies that the new approach will not have a significant economic impact on a substantial number of small entities. The Commission will send a copy of the First Report and Order, including a copy of this Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the SBA.⁵ This certification also will be published in the Federal Register.⁶

Paperwork Reduction Act of 1995 Analysis

14. The First Report and Order does not contain new or modified information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. The information collection requirements for the section 310(b) foreign ownership approval process are included in OMB Control No. 3060-0686. In addition, therefore, this document does not contain any new or modified information collection burden for small business concerns with fewer than 25 employees, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, see 44 U.S.C. 3506(c)(4).

Report to Congress

15. The Commission has included a copy of the First Report and Order in a report sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act. See 5 U.S.C. 801(a)(1)(A).

Ordering Clauses

16. IT IS ORDERED, pursuant to sections 1, 2, 4(i), 4(j), 5(c), 10, 303(r), 308(b), 309, 310(b), 310(d), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i), 154(j), 155(c), 160, 303(r), 308(b), 309, 310(b), 310(d), and 403, that

⁵ 5 U.S.C. 605(b).

⁶ Id.

the First Report and Order in IB Docket No. 11-133 IS ADOPTED.

17. IT IS FURTHER ORDERED that the requirements of this First Report and Order SHALL BE EFFECTIVE upon publication in the Federal Register.⁷

18. IT IS FURTHER ORDERED that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, SHALL SEND a copy of this Report and Order, including the Regulatory Flexibility Certification, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch,
Secretary.

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⁷ See 47 CFR 1.103, 1.427(b). As set forth above, by forbearing from applying the strict section 310(b)(3) foreign ownership limit to the subject class of common carrier licensees, we afford these licensees and their potential owners greater flexibility in the structuring of their investment, free of a statutory constraint. Our action thereby "relieves a restriction" within the meaning of 5 U.S.C. 553(d)(1).